IN THE

# SUPREME COURT OF THE UNITED STATES

October Term 1969

No.

HERBERT F. WASCHER, Petitioner

v.

RANDOLPH LUNDEEN, CHAMPAIGN-URBANA CITY LINES, INC., a corporation, and NATIONAL BANK OF MONTICELLO, a Banking Corporation, Respondents

**Petition for a Writ of Certiorari to The Supreme Court of Illinois and The Appellate Court of Illinois, for the Fourth District.**

Herbert F. Wascher prays that a Writ of Certiorari issue to review the judgments of the Appellate Court of Illinois, Fourth District entered August 14, 1969 and that of the Supreme Court of Illinois on November 24, 1969.

The grounds for jurisdiction of this Court relate to failure to give notice, concealment, alleged fraud and denial of right and opportunity to be heard on a day in trial court with a jury. And the consideration of possible wrong judgments, proceedings and opinions

of state courts that could be repugnant to Federal law. A National Bank under Federal control and the Veterans' Administration being involved.

An extension of time within which to file a Writ of Certiorari to April 23, 1970 was granted by entry of an order in this court on February 25, 1970 by the Honorable Thurgood Marshall, Associate Justice.

It is believed the Fourteenth Amendment and due process of law is applicable in affording relief to an aggrieved party.

The primary questions and issues are whether a National Bank conservator of the estate only of an incompetent veteran can compromise a claim and suit for damages for personal or bodily injuries without the knowledge, consent or notice to the veteran. The County Court waived the appointment of a guardian ad litem. The ward by education and experience was capable of understanding proceedings in his best interests. The Illinois statutes provide for a separate and distinct conservator of the person. By misrepresentation of injuries an order to settle was obtained and releases given. Dismissal in Circuit Court followed.

The question of why the County Court at a later date reversed itself and authorized the conservator to tender the settlement sum back and seek further recovery in recision of settlement. The matter of it being a fair and just settlement and allegations of concealment and fraud. Also issue of adverse or conflict of interest and validity of releases. The doctrine of res judicata and some judgments still stand.

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The matter of a prior Appellate Court taking jurisdiction of a next friend's complaint which they admit to be infirm and voidable. Then passing judgment on issues in error while stating that "a decision in this case is difficult." Also stating as follows: "Had there been any mistake, error or omission on the part of the conservator we would be inclined to hold that the releases should be held invalid."

This case involves the results of an accident with an automobile driver and a City Bus Line charged with negligence and liability. The conservator bank is an added defendant because of irregularities in a compromise settlement. It being the duty of the conservator and the court to guard and protect the best interests of the incompetent at all times. The conservator stated that the ward had made a satisfactory recovery from the said injuries when in fact they knew the ward had a serious and permanent type of injury with a 20 per cent loss of use of the left leg that causes some pain and discomfort daily and will continue to do so.

This inadequate settlement was made many months after the accident and without consulting the ward or his attending physicians as to the then or current condition of his injuries. The amounts were $2,000.00 from the one defendant and $750.00 from the Bus Company. It should be noted here that the defendants had complete information regarding the extent, seriousness and permanency of the injuries.

Upon dismissal of suit the ward did not learn of these actions until discovered 10 months later. During this time he was led to believe and did in fact believe

that his $80,000 damage suit was still pending in Circuit Court. This would appear to be concealment and deception at its very worst. It is believed the judgments and releases in the county and Circuit Courts are vulnerable as to fraud. All of these actions took place without the knowledge, consent or notice to the ward. Adverse and conflict of interest is plainly evident. If the matter of fraud is only to be determined by a jury, then this has been denied.

In regard to res judicata, the conservator was the plaintiff in the original suit and there was no privity whatever between the conservator and the ward during the settlement and court proceedings. The meaning of privity being joint, mutual, concurrence and consent. The matter of giving notice was not present.

Recognizing the gross irregularities in the settlement the County Court reversed itself in a written order on petition by a next friend.

> No. 3381, May 28, 1959. In the matter of the Conservatorship of Herbert F. Wascher, "now on this day proof of notice by mailing is made on the hearing on the petition for authority, which said proof is by the Court approved. And on this day National Bank of Monticello, conservator herein, appears in open court by its attorneys, Busch and Harrington. And on this day said petition of the incompetent by Jesse Gibson, his next friend, being heard on proof submitted, upon consideration thereof, said petition is by the Court allowed and said conservator authorized to tender sum in settlement against Randolph Lundeen, Champaign-Urbana City Lines, Inc., and to incur expenses necessary in seeking recovery sought as set forth in said petition."

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Five months later there appears an order and entry on the docket sheet in Conservatorship No. 3381.

> November 3, 1959 "Motion by Conservator for aid and directions. Hearing on Motion. Conservator directed to make tender in recision of settlement as heretofore authorized."

No notices were sent out for this later hearing. The next friend's attorney was unaware of it.

It appears that the significance and implications of these orders has been ignored by the defendants and the higher courts.

But the conservator consistently neglected and refused to take any action and later resigned after a petition for removal for cause.

In the meantime the next friend filed suit for damages against Lundeen and the Bus Company. This was dismissed on basis of prior judgment. A motion to vacate, set aside, amend and tender the money was denied. Then appeal to the Appellate Court was taken. The opinion of that court was to the effect that the next friend had no standing and was without authority to act. Nevertheless they proceeded to pass judgment on issues in error. Their reference to the tender order by the County Court was that it was a "permissive order."

The instant case is a new complaint filed by the petitioner in his own right and with the former conservator, National Bank of Monticello, as an added defendant. The suit asked for $100,000 damages. The Circuit

Court of Champaign County, Illinois dismissed under Sec. 48 of the Illinois Revised Statutes on the basis of prior judgment. This was appealed to the Appellate Court which affirmed under res judicata. The Supreme Court of Illinois denied a Petition for Leave to Appeal.

Count I is devoted to the manner of the accident in 1955 in which the plaintiff was a pedestrian in the act of boarding a common carrier city bus. Count II relates to circumstances and proceedings surrounding the irregular settlement.

A conservator was first appointed March 26, 1932 and the National Bank of Monticello appointed conservator of the estate on March 20, 1944. Letters were revoked by an interim conservator and restoration was made on March 1, 1967. The first appointment was made while the veteran was a patient in a U.S. Veterans' Bureau mental hospital and afflicted with a condition then known as dementia praecox. He became a ward of the Veterans' Administration.

This litigation is composed of pleadings of issues and facts, briefs and oral arguments. There is no trial record of physicians' testimony or the plaintiffs and others. To a large extent it represents what occurs when there is a failure to give notice in the premises. Counsel for the next friend and the plaintiff have repeatedly stressed this point in proceedings and the matter of a day in court and jury demand.

> "Independently of statutes, every person is entitled to his day in court. Notice and the opportunity to be heard lie at the foundation

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of all judicial procedure. They are fundamental principles of justice which cannot be ignored. Without them no citizen would be safe from the machinations of secret tribunals. No mere ex parte proceeding can affect either personal or property rights and has no proper place in a court of justice." Bary v. Hall 98 F 226.

In conclusion, petitioner prays that due consideration be given to the merits of the cause, that a Writ of Certiorari be granted and that truth and justice shall prevail.

HERBERT F. WASCHER
814 W. Harvard
Champaign, Illinois 61820,
Petitioner.

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FILED
APR 21 1970
JOHN E. DAVIS, CLERK

ON CERTORARI

In The

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

## No. 1451

HERBERT F. WASCHER, Petitioner

v.

RANDOLPH LUNDEEN, Champaign-Urbana
CITY LINES, INC., a Corporation and
NATIONAL BANK OF MONTICELLO,
a Banking Corporation,

Respondents.

## APPENDIX TO PETITION FOR WRIT OF CERTORARI TO THE ILLINOIS SUPREME COURT AND THE APPELLATE COURT OF ILLINOIS, FOURTH DISTRICT

HERBERT F. WASCHER
814 W. Harvard
Champaign, Illinois 61820
Petitioner

SCHNEPP & BARNES PRINTERS, INC., SPRINGFIELD, ILL.

ON CERTORARI

In The

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

## No. 1451

HERBERT F. WASCHER, Petitioner

v.

RANDOLPH LUNDEEN, Champaign-Urbana CITY LINES, INC., a Corporation and NATIONAL BANK OF MONTICELLO, a Banking Corporation,

Respondents.

## APPENDIX TO PETITION FOR WRIT OF CERTORARI TO THE ILLINOIS SUPREME COURT AND THE APPELLATE COURT OF ILLINOIS, FOURTH DISTRICT

STATE OF ILLINOIS } SS.
COUNTY OF CHAMPAIGN }

IN THE COUNTY COURT
OF CHAMPAIGN COUNTY

IN THE MATTER OF THE ESTATE OF } No. 3381
HERBERT F. WASCHER, An Incompetent, }

### ORDER TO SETTLE INJURY TO WARD

And now on this 9th day of September, A.D. 1957, the same being one of the regular judicial days of the said

court in and for the County of Champaign, State of Illinois, this matter coming on to be heard on the Petition of the Conservator to settle action for injury to the said ward, the following order was had, ordered and passed of record:

PRESENT THEREAT: The Honorable Frederick S. Green, Judge of said court.

1. That Court finds that National Bank of Monticello was appointed conservator of the estate of Herbert F. Wascher, an incompetent, on the 20th day of March, 1944, and has at all times since and is now the duly qualified and acting conservator of the estate of the said ward, and the Court further finds that the estate of the said ward consists partly of a cause of action in the Circuit Court of Champaign County, Illinois, under 56 L 49 against Randolph Lundeen and Champaign-Urbana City Lines, Inc., a corporation, as a result of an accident which occurred on February 10, 1955, about 7:00 P.M. on Chalmers Street in the middle of the block east of Third Street in the City of Champaign, County of Champaign, State of Illinois, when the said ward as a pedestrian was crossing the said Chalmers Street on his way to board a bus of the Champaign-Urbana City Lines, Inc. which had stopped in the middle of the block to permit the said ward to board the said bus, and the said ward was struck on the said street by an automobile being driven by the said Randolph Lundeen in an easterly direction on the said Chalmers Street, and the said ward was pinned between automobile of the said Randolph Lundeen and the said bus and sustained injuries consisting of fracture of the pelvis and a severe bruise and contusion to his left leg below the knee; that the said ward was hospitalized in the Burnham City Hospital approximately two months and was treated by the Dr. Donald Ross of the Christie Clinic

and incurred bills in the form of an ambulance bill, hospital bill and doctor bill, all of which bills have been paid; that Robert C. Summers and Busch & Harrington, duly licensed attorneys, were employed to investigate the circumstances surrounding the injury and to prepare the said causes of action for trial and to represent the conservator of the said estate in the said action filed in the Circuit Court of Champaign County under 56 L 49, and the said attorneys advanced the following costs and expenses in connection with the representation: Twenty Dollar filing fee to the Circuit Clerk of Champaign County; Ten Dollars Forty Cents ($10.40) to the Sheriff of Champaign County; and Forty Five Dollars Twenty Five Cents ($45.25) to Public Stenographic Service for depositions; that the said attorneys have entered into negotiations with the defendants and their insurance carriers and have received from said defendants or their insurance carriers offers totaling Two Thousand Seven Hundred Fifty Dollars ($2,750) and the said attorneys have recommended to the conservator that the said causes of action be settled and releases given upon the receipt of the said Two Thousand Seven Hundred Fifty Dollars; that the said ward has made a satisfactory recovery from his said injuries.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the Petitioner shall upon the receipt of the sum of Two Thousand Dollars ($2,000) from the said Randolph Lundeen or his insurance carrier execute a release running to the said Randolph Lundeen and his said insurance carrier, and upon the receipt of the sum of Seven Hundred Fifty Dollars ($750.00) from Champaign-Urbana City Lines, Inc., or its insurance carrier, execute a release running to the said corporation and its insurance carrier in satisfaction of the said causes of action and

shall dismiss the suit now pending under 56 L 49 in the Circuit Court of Champaign County, Illinois.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the conservator shall pay to Robert C. Summers and Busch & Harrington, as attorneys, a fee consisting of one third of the amount recovered making a total fee of Nine Hundred Sixteen Dollars Sixty Six Cents ($916.66) and the conservator shall pay to the said attorneys the costs and expenses advanced by them as hereinabove described, totaling Seventy Five Dollars Sixty Five Cents ($75.65).

ENTER: Frederick S. Green
Judge of Said Court

**Filed September 9, 1957**
**Harry A. Little**
**Clerk of the County Court**

National Bank of Monticello, as Conservator of the Estate of Herbert F. Wascher, an Incompetent

vs.

Randolph Lundeen, and Champaign-Urbana City Lines, Inc., a corporation

Common Law #56-L-49

Now come the parties hereto, by their Attorneys, and it appearing to the Court that the cause of action herein has been settled, on motion of the plaintiff it is ordered by the Court that this suit be and the same hereby is dismissed at the costs of the plaintiff, and it is adjudged that said plaintiff pay all costs herein and in default thereof that a fee bill issue therefor, and it now appearing to the Court that the Costs herein have been fully paid,

it is thereupon ordered by the Court that this cause be and the same hereby is stricken from the docket.

September 13, 1957

The Honorable Charles E. Keller, Judge Presiding.

May 28, 1959

3381 In the Matter of the Conservatorship of Herbert F. Wascher,

Now on this day proof of notice by mailing is made on the hearing on the petition for authority, which said proof is by the Court approved. And on this day National Bank of Monticello, Conservator herein, appears in open Court by its attorneys Busch and Harrington. And on this day said petition of the incompetent by Jesse Gibson, his next friend, being heard on proof submitted, upon consideration thereof, said petition is by the Court allowed and said Conservator authorized to tender sum in settlement against Randolph Lundeen, Champaign City Lines, Inc. and to incur expenses necessary in seeking recovery sought as set forth in said petition.

November 3, 1959

3381 In the Matter of the Conservatorship of Herbert F. Wascher, an incompetent

Motion by Conservator for aid and directions. Hearing on motion. Conservator directed to make tender in recision of settlement as heretofore authorized.

The Honorable Frederick Green, Judge Presiding.

Order, in writing, dated September 29, 1960, signed by Birch E. Morgan, Judge Presiding of the Circuit Court of Champaign County, omitting caption, signature and formal parts, as follows:

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED:

1. That the name of Walter Reinhold be and he is hereby substituted as next friend and party plaintiff in the above-entitled cause;

2. That the above-entitled action be carried on with the continuing parties and without a change in the title of said action.

3. That the Clerk of the Court be ordered to substitute the name of Walter Reinhold for that of Jesse Gibson, as next friend of Herbert F. Wascher, an incompetent, wherever the name of Jesse Gibson now appears in the records and files of the Clerk of this Court in this cause.

Order of May 26, 1960, in Case 59-L-344.

Now come the parties hereto, by their Attorneys, and the Court having had consideration of the respective motions of the defendants to dismiss under Section 48 of the Civil Practice Act, and the objections of the plaintiff thereto, and being now fully advised thereon allows the said motions to dismiss, and it is thereupon ordered by the Court that this suit be and the same hereby is dismissed at the costs of the said plaintiff, and it is further ordered by the Court that judgment be and the same hereby is entered herein in favor of the defendants, Randolph Lundeen and Champaign-Urbana City Lines, Inc., a corporation, and against the plaintiff in bar of the action of the plaintiff and for costs of suit, and it is considered, ordered and adjudged by the Court that said plaintiff be and he hereby is forever barred from further prosecution upon the same cause of action against the said defendants, Randolph Lundeen and Champaign-Urbana City Lines, Inc., and that said plaintiff pay all costs herein and in default thereof that a fee bill issue therefor.

The Honorable Birch E. Morgan, Judge Presiding.

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**EXHIBIT C**

State of Illinois

APPELLATE COURT — THIRD DISTRICT

AT AN APPELLATE COURT, Begun and held for the Third District of the State of Illinois, at Springfield, on the FIRST TUESDAY in OCTOBER, A.D. 1961.

**Present**

HONORABLE BURTON A. ROETH, Presiding Justice
HONORABLE C. ROSS REYNOLDS, Justice
HONORABLE WILLIAM M. CARROLL, Justice

Attest: ROBERT L. CONN, Clerk.

BE IT REMEMBERED, that afterward, to-wit: On the 18th day of October, A.D. 1961, there was filed in the office of the said Clerk of said Court, an opinion of said Court, in words and figures following:

STATE OF ILLINOIS
APPELLATE COURT
THIRD DISTRICT.

**General No. 10356** **Agenda No. 1**

Herbert F. Wascher, an incompetent, by Walter Reinhold, his next friend, Plaintiff-Appellant,

vs.

Randolph Lundeen and Champaign-Urbana City Lines, Inc., a corporation, Defendants-Appellees.

**Appeal from the Circuit Court of Champaign County**

REYNOLDS, J.

Herbert F. Wascher, was adjudged incompetent in 1932,

and since 1944 the National Bank of Monticello, Illinois, has been the conservator of his estate. On February 10, 1955, he sustained injuries when struck by an automobile driven by Randolph Lundeen, one of the defendants. Suit was brought in the Circuit Court of Champaign County by the conservator bank against Lundeen and the Champaign-Urbana City Lines, Inc. for damages, charging both defendants with negligence. The cause was settled by compromise, and the bank filed a petition in the County Court of Champaign County, for authority to compromise and settle the claim of the incompetent for $2,750.00, on the basis of $2,000.00 from Randolph Lundeen and $750.00 from the bus company. The County Court by its order granted the petition and authorized a settlement for $2,750.00 and the conservator bank thereupon executed a conservator's release to the defendants, and the suit in Circuit Court was dismissed on September 13, 1957.

After the settlement for $2,750.00 had been authorized by the County Court, Jesse Gibson, as next friend of Wascher, filed a petition in County Court for authority and directions to appoint a conservator ad litem to reopen the Circuit Court case or to set aside the releases given therein, and for authority to tender back the money paid. This petition was granted by the County Court, in the following language: "*** And on this day said petition of the incompetent by Jesse Gibson, his next friend being heard on proof submitted, upon consideration thereof, said petition is by the Court allowed and said Conservator authorized to tender sum in settlement against Randolph Lundeen, Champaign City Lines, Inc. and to incur expenses necessary in seeking recovery sought as set forth in said petition."

Subsequently, in 1959, Jesse Gibson, as next friend of the incompetent Herbert F. Wascher, filed suit in the

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Circuit Court of Champaign County, against Lundeen and the bus company, charging each with negligence. The defendants filed their motion to strike and dismiss the complaint, on the grounds that the next friend had no legal right to bring suit, and that the suit was barred by the order entered in the previous suit. The court allowed the motion and dismissed the suit as to each defendant. Later, Gibson died and Walter Reinhold was substituted as next friend. Plaintiff asked leave to amend the complaint and to tender return of the money, which was denied by the court. Plaintiff appeals to this court.

The plaintiff's theory is that the conservator did not fully disclose the extent and permanency of the ward's injuries to the County Court when it applied for authority to settle claims and to execute releases to the defendants; that there should have been a guardian ad litem appointed for the hearing on the petition to execute the releases; that the order of the County Court authorizing the conservator to tender back the money paid by the defendants and to proceed further against them was not carried out by the conservator bank, so that the releases were voided as a matter of law.

The first point, that the conservator did not fully disclose the extent and permanency of the ward's injuries to the County Court is not borne out by any facts that would sustain this contention. The order of the County Court authorizing the conservator to settle the claims against the defendants and to execute releases, recited that Robert C. Summers and Busch & Harrington, duly licensed attorneys had been employed to investigate the circumstances of the injury and to represent the conservator in the suit against the defendants in the Circuit Court; that the attorneys had received offers of $2,750.00 and that the said attorneys had recommended to the con-

servator that the said causes of action be settled and releases be given. That a full investigation of the case had been made is further supported by the affidavit of John C. Hayes, attorney-at-law.

The appointment of a guardian ad litem is urged as mandatory. The two cases cited by the plaintiff each relate to a minor and there is nothing in either of those two cases to show that it is mandatory that a guardian ad litem be appointed where the ward has a duly qualified and acting conservator. Nor, do the cases cited by defendant Lundeen reach this point. The Statute provides that the conservator of the estate of an incompetent shall appear for and represent the ward in all legal proceedings, unless another person is appointed for that purpose as conservator or next friend. But this does not impair the power of any court to appoint a conservator or next friend to defend the interests of the ward in that court, or to appoint or allow any person as the next friend of a ward to commence, prosecute or defend any suit in his behalf. Section 124, Chap. 3, Ill. Rev. Statutes. This language is plain and unequivocal. The conservator of an incompetent shall represent the ward in all legal proceedings, unless in the discretion of the court, it is deemed advisable to appoint another person as conservator or next friend to represent the ward. After the court appoints the conservator, the conservator acts for the ward, unless there is a conflict of interest, or some other good and sufficient reason to appoint some other person to represent the ward. **Pyott v. Pyott**, 191 Ill. 280; **Isle v. Cranby**, 199 Ill. 39. Here, the county court had full authority to appoint Jesse Gibson or any other person as conservator or next friend to represent the plaintiff, but it did not do so. There was no showing of an adverse interest on the part of the conservator, but only the allegation that a full disclosure of

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the extent of the injuries of the plaintiff was not made to the court. Yet, upon a petition to the county court setting out these injuries, by Jesse Gibson as next friend, court granted an order, permissive in character only, authorizing the conservator to tender back the money received and to prosecute further the original claims. This, the conservator bank did not do. Lacking appointment as provided for by the Statute, and failure to show any good and sufficient reason for the appointment of another conservator or next friend, it would seem that the next friend is without authority to institute or pursue this suit. The contention of the necessity of a guardian ad litem would have some force, if there were no conservator or person authorized to act for the incompetent, since the duty of the court is to guard the interests of the incompetent at all times. A guardian ad litem is one appointed for the purpose of representing an infant or incompetent to prosecute or defend. We find no authority for the appointment of a guardian ad litem in this cause. Had the county court appointed another person as conservator for this particular cause, or as next friend, that is provided for by the Statute. There was no necessity for a guardian ad litem appointment. Since there was no appointment of any kind, the conservator was the proper one to act for the ward. It may well be, that upon a proper showing the county court might have appointed the self-appointed next friend, to act for the plaintiff, but since this was not done, the first next friend, or the substitute, had no authority to act.

That the conservator, upon approval of the court had the power to compromise the claim of the plaintiff is without question. Section 215, Chap. 3, Ill. Rev. Statutes provides that by leave of court without notice or upon such notice as the court directs, a conservator may compound

or compromise any claim or any interest of the ward. There is no contention here that the county court did not have jurisdiction of the estate of the incompetent. It had had jurisdiction since 1932. There is no error evident on the face of the record. There is no fraud shown. The brief for the plaintiff says the defendants were charged with notice of the infirmities of the conservator's release. But there are no infirmities shown. Here there was a release, executed for the amount as ordered by the county court. The mere fact that upon a later date, the court authorized the conservator to tender back and take further proceedings, does not, of itself, in the absence of further action by the same court, invalidate the original order of the court, which authorized the releases. In the light of the case of **Voegel v. Central Nat. Bank of Mattoon**, 27 Ill. App. 2d 400, it is doubtful if the county court of Champaign County, having authorized the settlement and the giving of the releases, could by a subsequent order revoke such releases. But, assuming that the County Court did have the power to correct its mistake, if mistake there was, it would take more than a permissive order to correct the mistake. Where a release was given by order of court, it may only be held void, where the release is obtained by misrepresentation, overreaching, or other fraud. A unilateral mistake is not sufficient. **Thomas v. Hollowell**, 20 Ill. App. 2d 288; **Clancy v. Pacenti**, 15 Ill. App. 2d 171; **Fraser v. Glass**, 311 Ill. App. 336. As said in the **Thomas v. Hollowell** case, quoting American Jurisprudence on Release, Section 19: "The great weight of authority supports the doctrine that a release of a claim for personal injuries cannot be avoided merely because the injuries have proved more serious than the releasor, at the time of executing the release, believed them to be, or because the releasor made a bad bargain on account of a wrong estimate of the

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damages which would accrue." It is true that our courts have been inclined to set aside releases which subsequently prove to be grossly unfair or unjust. **Ruggles v. Selby,** 25 Ill. App. 2d 1; **Clancy v. Pacenti,** 15 Ill. App. 2d 171. Here there is no showing of a settlement that was grossly unfair or unjust. It is true the ward by his next friend, claims more serious injuries than the settlement called for. But the record shows that two competent attorneys acting for the conservator bank, determined that the amount received, on the basis of the facts and the injuries, was reasonable and recommended the settlement be made and the county court on the basis of these matters, authorized the settlement and the giving of the releases. In the case of **Clancy v. Pacenti,** 15 Ill. App. 2d 171, the court while recognizing the trend of the courts to set aside releases where made under a mistake, said: "Yet it is important to preserve a field of free action within which parties may compromise their differences with substantial assurance that the matter will not arise again."

A decision in this case is difficult. On the one hand, nothing should be left undone to protect the rights of an incompetent. On the other hand, releases executed in good faith and without fraud should be given full faith and credit and upheld. Had there been any mistake, error or omission on the part of the conservator, we would be inclined to hold that the releases should be held invalid. But in this case, the conservator was represented by competent counsel. There probably were facts related to the case which involved the question as to whether there was any liability at all on the part of the defendants. The facts were investigated thoroughly, and the conservator was offered a sum which, in the opinion of these attorneys, was fair and reasonable. They recommended to the county court that the settlement be made and releases be given.

An order was entered in accordance to their recommendations. The case in Circuit Court of Champaign County involving the same parties, the same subject matters and the same facts, was dismissed.

We find no fraud, mistake, omission or that the settlement was grossly unfair or unjust. The mere pleading that the settlement was unfair or inadequate does not make it true. The judgment dismissing the complaint is affirmed.

Affirmed.

ROETH, P. J. and CARROLL, J., concur.

State of Illinois
APPELLATE COURT
Third District
Springfield

Chambers of
JUDGE C. ROSS REYNOLDS
Vienna, Illinois

November 10, 1961

No. 10356

IN THE APPELLATE COURT OF ILLINOIS

Third District

May Term, A.D. 1961

| | |
|---|---|
| Herbert F. Wascher, an incompetent, by Walter Reinhold, his next friend, Plaintiff-Appellant, vs. Randolph Lundeen, and Champaign-Urbana City Lines, Inc., a corporation, Defendants-Appellees. | Appeal from the Circuit Court of Champaign County, Illinois. Honorable Birch E. Morgan, Judge Presiding |

**Order of The Court**

This cause coming on for hearing on the petition to

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certify that the case is of such importance as to be submitted to the Supreme Court. It is the order and judgment of the court that the petition for certificate of importance be and it is hereby denied.

Dated this the 11th day of November, A.D. 1961.

/s/ C. Ross Reynolds
Justice

/s/ Birton A. Roeth
Justice

/s/ William M. Carroll
Justice

IN THE CIRCUIT COURT OF THE
SIXTH JUDICIAL CIRCUIT
CHAMPAIGN COUNTY, ILLINOIS

| | |
|---|---|
| HERBERT F. WASCHER,<br>Plaintiff,<br>vs.<br>RANDOLPH LUNDEEN, CHAMPAIGN-URBANA CITY LINES, INC., a corporation, and NATIONAL BANK OF MONTICELLO, a Banking corporation,<br>Defendants. | At Law<br>No. 68-L-166 |

**ORDER**

Now on this 2nd day of May, 1968, the same being one of the regular judicial days of this Court, the following Order was had and entered in said cause among other Orders entered in said Court.

NOW APPEAR the parties to said cause by their respective attorneys and the motion of the defendant, RANDOLPH LUNDEEN, to dismiss said action under Section 48 of the Illinois Civil Practice Act being presented,

and the Court having heard evidence and argument of counsel and being fully advised in the premises, finds that:

1. The Court has jurisdiction of the persons and subject matters.

2. The Court takes judicial notice of the record and proceedings including the judgment entered in the case entitled National Bank of Monticello, as Conservator of the Estate of Herbert F. Wascher, an Incompetent vs. Randolph Lundeen and Champaign-Urbana City Line, a corporation, carried on the docket of this Court as common law case no. 56-L-49. All the proceedings had in that said cause are hereby made a part of the record in this case.

3. This Court further takes judicial notice of the records and proceedings in the cause entitled Herbert F. Wascher, an incompetent, by Walter Reinhold, his next friend, plaintiff, vs. Randolph Lundeen and Champaign-Urbana City Lines, Inc., a corporation, defendants, carried on the docket of this Court as common law case no. 59-L-344, and by this reference makes the records, proceedings and judgment in said cause a part of this record.

4. This Court further takes judicial notice of the decision of the Appellate Court of the Third District of the State of Illinois entered in the cause entitled General No. 10356 entitled Herbert F. Wascher, an incompetent, by Walter Reinhold, his next friend, plaintiff-appellant, vs. Randolph Lundeen and Champaign-Urbana City Lines, Inc., a corporation, defendants-appellees, and makes the written decision of said Appellate Court and incorporates herewith the written decision of said Appellate Court as a part of the record in this cause.

5. The Court finds that the Order heretofore entered by the Circuit Court of Champaign County, Illinois, authorizing the National Bank of Monticello as conservator of

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the estate of Herbert F. Wascher, an incompetent, was duly and lawfully entered, and said conservator was duly and lawfully authorized to enter into settlement and to execute the releases to the defendants attached to said motion.

6. The Court further finds that the orders and judgments heretofore entered by this Court, the causes heretofore described and the decision of the Appellate Court are final orders and judgments.

7. The Court finds that the causes of action sought to be alleged by the plaintiff against the defendant, Randolph Lundeen, have heretofore been decided and disposed of by a Court having competent jurisdiction of the persons and subject matter, and that the cause of action sought to be alleged by the plaintiff is barred by prior judgment.

8. The Court further finds that the complaint or demand set forth in the plaintiff's complaint has been released and satisfied of record.

IT IS THEREFORE HEREBY ORDERED, ADJUDGED AND DECREED that the motion of the defendant, Randolph Lundeen, to dismiss the Complaint under Section 48 of the Illinois Civil Practice Act be, and the same is, hereby allowed, and the Complaint of the plaintiff is therefore dismissed.

It further appearing to the Court that the plaintiff, Herbert F. Wascher, by his attorney, announces that he elects to stand upon his complaint as heretofore filed, and IT IS THEREFORE HEREBY FURTHER ORDERED, ADJUDGED AND DECREED that judgment be, and the same is, hereby entered in favor of the defendant, Randolph Lundeen, and against the plaintiff, Herbert F. Wascher, in bar of action and for costs of suit, and the plaintiff,

Herbert F. Wascher, shall take nothing by his suit, and the defendant, Randolph Lundeen, shall go hence without day.

On motion of the plaintiff that this Court fix bond in the event of an appeal, the Court fixes the amount of any such appeal bond in the amount of $1,000.00 with sureties to be approved by the Court, and IT IS SO ORDERED.

The Honorable Birch E. Morgan, Judge Presiding.

IN THE CIRCUIT COURT OF THE
SIXTH JUDICIAL CIRCUIT

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| Herbert F. Wascher,<br>Plaintiff<br>vs.<br>Randolph Lundeen, Champaign-Urbana City Lines, et al. | At Law<br>No. 68-L-166 |

Order of 2nd day of May, 1968 dismissing action against Champaign-Urbana City Lines and entering judgment in their favor. This order is identical with that entered for Randolph Lundeen.

The Honorable Birch E. Morgan, Judge Presiding.

IN THE CIRCUIT COURT OF THE
SIXTH JUDICIAL CIRCUIT
CHAMPAIGN COUNTY, ILLINOIS

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|---|---|
| HERBERT F. WASCHER,<br>Plaintiff,<br>vs.<br>RANDOLPH LUNDEEN CHAMPAIGN-URBANA CITY LINES, INC., a corporation, and NATIONAL BANK OF MONTICELLO, a Banking corporation,<br>Defendants. | AT LAW<br>NO. 68-L-166 |

**ORDER**

And now on this 2d day of May, A.D. 1968, the same being one of the regular judicial days in and for the county and state aforesaid, the following order was had, entered and passed of record:

PRESENT THEREAT: The Honorable Birch E. Morgan, Judge Presiding.

And now on this day came the parties to said cause by their respective attorneys, and the motion of the National Bank of Monticello, a banking corporation, to dismiss said action under Section 48 of the Illinois Civil Practice Act, being present and the Court having heard evidence and argument of counsel and being fully advised in the premises, finds that:

1. This Court has jurisdiction of the subject matter herein and the parties hereto.

2. This Court takes judicial notice of the record and proceedings including the judgment entered in the cause entitled National Bank of Monticello as Conservator of the Estate of Herbert F. Wascher, an Incompetent, vs. Randolph Lundeen and Champaign-Urbana City Lines, Inc.,

a corporation, being cause number 56-L-49, and all proceedings of said cause are hereby made a part of the record in this cause.

3. This Court further takes judicial notice of the records and proceedings in the cause entitled Herbert F. Wascher, an Incompetent, by Walter Reinhold, his next friend, Plaintiff, versus Lundeen and Champaign-Urbana City Lines, Inc., a corporation, Defendants, being cause number 59-L-344, and the proceedings had therein are incorporated by reference herein.

4. This Court further takes judicial notice of the decision of the Appellate Court of the Third District (now Fourth) of the State of Illinois in General Cause No. 10356 entitled Wascher, an incompetent, by Walter Reinhold, his next friend, Plaintiff-Appellant, versus Lundeen and Champaign-Urbana City Lines, Inc., Defendants-Apellees, and makes that written decision a part of the records herein by reference.

5. That this Court further takes judicial notice of all the proceedings in the conservatorship proceeding entitled In the Matter of the Estate of Herbert F. Wascher, an Incompetent, in the County Court of Champaign County, Illinois In Probate being cause number 3381.

6. The Court finds that the order heretofore entered by the Circuit Court of Champaign County, Illinois authorizing the National Bank of Monticello as conservator of the Estate of Herbert F. Wascher, an incompetent, was duly and lawfully entered, and said conservator was duly and lawfully authorized to enter into settlement and to execute the release to the defendants.

7. The Court further finds that the orders and judgments heretofore entered by this Court the causes heretofore described and the decisions of the Appellate Court are final orders and judgments, and that the cause of

BLEED THROUGH POOR COPY

action sought to be alleged by the plaintiff against the defendant, National Bank of Monticello have heretofore been decided and disposed of by a court of competent jurisdiction of the persons and subject matter, and the plaintiff herein has not alleged or shown any facts attacking the jurisdiction of the County Court of Champaign County, Illinois in the said conservatorship proceeding, which he was bound to do, and therefore, is not entitled to any relief in this court, and the allegations of the complaint filed herein by the plaintiff consist of a collateral attack only upon the judgment or order of the County Court in cause number 3381.

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED that the motion of the defendant, National Bank of Monticello, a corporation, to dismiss the complaint be, and the same is hereby allowed, and the complaint of the plaintiff is dismissed.

IT FURTHER APPEARING to the Court that the plaintiff, Herbert F. Wascher, by his attorney, announces that he elects to stand upon his complaint as heretofore filed, it is, therefore, ordered, adjudged and decreed that judgment be, and the same is hereby, enterd in favor of the defendant, National Bank of Monticello, a corporation, and against the plaintiff, Herbert F. Wascher, in bar of action and for costs of suit, and the plaintiff, Herbert F. Wascher, shall take nothing by his suit and go hence without day.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that on the motion of the plaintiff, an appeal bond be fixed, the appeal bond is hereby fixed in the amount of One Thousand Dollars ($1,000.00) with sureties to be approved by the Court.

The Honorable Birch E. Morgan, Judge Presiding.

State of Illinois

APPELLATE COURT

AT AN APPELLATE COURT, for the Fourth Judicial District of the State of Illinois, sitting at Springfield:

PRESENT

HONORABLE HAROLD F. TRAPP, Presiding Judge
HONORABLE SAMUEL O. SMITH, Judge
HONORABLE JAMES C. CRAVEN, Judge

Attest: ROBERT L. CONN, Clerk.

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BE IT REMEMBERED, that to-wit: On the 14th day of August, A.D. 1969, there was filed in the office of the Clerk of the Court an opinion of said Court, in words and figures following:

STATE OF ILLINOIS

APPELLATE COURT

FOURTH DISTRICT

**General No. 11033** **Agenda No. 69-9**

Herbert F. Wascher,
Plaintiff-Appellant

vs.

Randolph Lundeen,
Champaign-Urbana City Lines, Inc., a Corporation, and National Bank of Monticello, a Banking Corporation,
Defendants-Appellees

Appeal from Circuit Court Champaign County

TRAPP, P. J.

This is an appeal from a judgment of the circuit court

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dismissing a suit by plaintiff against defendants pursuant to motions of the defendants under Section 48 of the Illinois Civil Practice Act asserting prior judgments and releases and the insufficiency of the complaint to state a cause of action. Ch. 110, §48, Ill. Rev. Stat. 1967.

Plaintiff was declared incompetent on March 26, 1932, for reasons not disclosed in this record, and subsequently on March 20, 1944, defendant, National Bank of Monticello, was appointed conservator of his estate. On March 1, 1967, he was adjudged not to be an incompetent and letters of conservatorship were revoked.

On February 10, 1955, plaintiff, while a pedestrian, was injured as a result of alleged joint and several negligence of defendants, Randolph Lundeen, an automobile driver, and Champaign-Urbana City Lines, Inc. Subsequently, the conservator of the plaintiff filed suit to recover damages from defendants, Randolph Lundeen and Champaign-Urbana City Lines, Inc., for the injuries.

On September 9, 1957, the conservator for the plaintiff petitioned the County Court of Champaign County for an order authorizing compromise and settlement of the suit upon payment of $2,000.00 by defendant, Randolph Lundeen, and $750.00 by defendant, Champaign-Urbana City Lines, Inc. The court granted the petition and the bank, as conservator, executed a release to the said defendants. On September 13, 1957, the conservator's common law action on behalf of plaintiff was dismissed.

After such settlement one Jesse Gibson, as next friend of plaintiff, obtained authority for the conservator to tender the settlement sum back and again to seek recovery from defendants. In 1959 Jesse Gibson, as next friend of plaintiff, filed suit against the defendants, Randolph Lundeen and Champaign-Urbana City Lines, Inc., charging

negligence. These defendants filed a motion to dismiss the complaint on the ground that the next friend had no legal right to sue and that the suit was barred by the order of dismissal in the previous suit. The suit was dismissed. Gibson died and Walter Reinhold was substituted as next friend. Plaintiff, by his next friend, asked leave to amend and tender return of the money. This motion was denied and plaintiff, by his next friend, appealed to the Appellate Court. The judgment of the Circuit Court was affirmed in **Wascher v. Lundeen,** 32 Ill. App. 2d 239; 177 N.E. 2d 440.

The reviewing Court held that the order authorizing the tender of the money back was a permissive order to the conservator and did not substitute the first or second next friend for the duly appointed conservator, and did not revoke the order approving the settlement. It therefore, held that neither the first or second next friend had authority to act. The court also found that since there was a conservator, no guardian ad litem was necessary. The court said there was no showing of adverse interest of the conservator, but only an allegation that full disclosure of the extent and permanency of the injuries was not made to the County Court.

The opinion expressed some doubt whether a release authorized by a court could be set aside absent misrepresentation, overreaching or fraud. It went on to find that there was no showing that the settlement was unfair or unjust. On the contrary, it found that the record showed that two competent attorneys, acting for the bank as conservator, determined that the amount received on the basis of the facts and the injuries, was reasonable and recommended the settlement be made. It was on the basis of these matters of record that the County Court authorized the settlement.

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The present suit generally charges fraud and concealment by the conservator in the County Court with reference to the seriousness of plaintiff's injuries. However, the specification of this charge is only that the conservator stated "in part" that the ward has made "satisfactory recovery" from the said injuries, whereas the conservator knew the ward had received "a serious and permanent type of injury". This same charge, except as to the language of fraud and concealment, was in the proceedings culminating in **Wascher v. Lundeen.**

While there is always an area of doubt created by the charge of "fraud" and "concealment", it has long been recognized by our courts that the use of such words alone does not create a cause of action. In **Fortune v. English,** 226 Ill. 262 on 269; 80 N.E. 781, our Supreme Court said of an alleged fraudulent concealment of a cause of action:

> "The words 'craftily', 'fraudulently', 'falsely' and 'maliciously' are of no avail in the absence of averments of facts to which they properly apply."

Without accepting an allegation of a "part" of a representation as sufficient to allege fraud, the quoted "satisfactory recovery" is not necessarily contradictory to the statement that plaintiff, in fact, had "a serious and permanent type" of injury. As to the materiality of the statement standing alone, it is recognized by all that settlement of a personal injury claim always involves consideration of the facts with reference to liability as well as the facts with reference to injury. **Thomas v. Hollowell,** 20 Ill. App. 2d 288 at p. 291; 155 N.E. 2d 827. The recommendation of settlement by the two attorneys who investigated the matter as stated in the record of the case previously appealed was found to be probably a recommendation based upon the total fact situation, and not the situation with reference to injuries alone. The

opinion expressly states that the allegation of concealment or failure to disclose was not borne out by any facts and that no fraud was shown.

It is upon the foregoing charges that plaintiff seeks to sue the original defendants and the conservator for the damages resulting from the original injuries to the plaintiff.

Plaintiff asserts that the trial court had no authority to dismiss the action under Section 48 of the Civil Practice Act, Ch. 110, §48(1), Ill. Rev. Stat. 1967, because defendants' motions were unverified. It is contended that there being an issue of fact raised, accompanied by a jury demand, the court had no alternative but to deny the motions to dismiss. In this case the basis of the motion is the prior judgment of the County Court approving the settlement, the prior judgment of the Circuit Court dismissing the conservator's original suit and the prior judgment in the case of **Wascher v. Lundeen,** 32 Ill. App. 2d 239; 177 N.E. 2d 440. These are all matters of which the court is required to take judicial notice. Ch. 110A, Rule 133(b), Ill. Rev. Stat. 1967. Moreover, the matters raised by the several motions were themselves alleged or recited in the complaint and there were no affidavits or proof denying the facts alleged or obviating the defect. Ch. 110, §48(3), Ill. Rev. Stat. 1967.

It is argued that the previous adjudications are not **res judicata** because identity of the parties is lacking. The identification in the authorities is "parties and their privies". **The People v. Kidd,** 398 Ill. 405, p. 408; 75 N.E. 2d 851. In the original suit by the conservator against Randolph Lundeen and Champaign-Urbana City Lines, Inc., and in the proceeding in the County Court for approval of the settlement the conservator was in privity with plaintiff. These judgments still stand.

It is insisted that since the reviewing court in **Wascher v. Lundeen**, 32 Ill. App. 2d 239; 177 N.E. 2d 440, held that the next friend had no standing to represent plaintiff, the other matters contained in the opinion are of no effect, and the case is not an adjudication that the charges of invalidity of the releases and dismissal of the original suit are without merit. We note that opinion had the language, "Had there been any mistake, error or omission on the part of the conservator, we would be inclined to hold that the releases should be held invalid." That court did, in fact, pass upon the merits of the case. The basis of the opinion of the reviewing court, which was seeking on its own to give every possible benefit to the incompetent within established principles of law, was the record of which we are required to take judicial notice. Having before us the very record which the reviewing Court had in the previous case, the order of the County Court of Champaign County approving the settlement, and the judgment of the Circuit Court of Champaign County dismissing the suit of the conservator against the original defendants are **res judicata.**

The judgment of the Circuit Court is affirmed.

AFFIRMED.

Smith and Craven, J.J., concur.

UNITED STATES OF AMERICA

STATE OF ILLINOIS } ss.
SUPREME COURT }

AT A TERM OF THE SUPREME COURT, begun and held in Springfield, on Monday, the tenth day of November in the year of our Lord, one thousand nine hundred and sixty-nine, within and for the State of Illinois.

BE IT REMEMBERED, that, to-wit: on the 24th day

of November, 1969, the same being one of the days of the term of Court aforesaid, the following proceedings were, by said court, had and entered of record, to-wit:

No. 42615

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| Herbert F. Wascher,<br>Petitioner<br>vs.<br>Randolph Lundeen, Champaign-Urbana City Lines, Inc., a corporation, and National Bank of Monticello, a banking corporation,<br>Respondents | Petition for Leave to Appeal from Appellate Court Fourth District 11033 |

And now on this day the Court having duly considered the Petition for Leave to Appeal herein and being now fully advised of and concerning the premises, doth overrule the prayer of the petition and denies Leave to Appeal herein.

Respectfully submitted,

HERBERT F. WASCHER
814 W. Harvard
Champaign, Illinois 61820
Petitioner